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# Supreme Court of the United States

No. 73-1762

October Term, 1973

FRANK C. WHALEN and the law firm of
KOHRMAN AND JACKSON,
*Petitioners,*

vs.

CLE-WARE INDUSTRIES INC. and
THE "1300" GROUP,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit

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## PETITION FOR WRIT OF CERTIORARI
**To the United States Court of Appeals for the Sixth Circuit**

The petitioners, Frank C. Whalen and the law firm of Kohrman and Jackson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 26, 1974.

## OPINIONS BELOW

The opinions of the Court of Appeals, District Court and the Bankruptcy Judge are not reported and the entire individual opinions are reprinted and appended to this petition. All judgment entries are also unreported and reprinted and appended to this petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1974. This Petition for a Writ of Certiorari has been filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1254 (1) and 11 U.S.C. 47 (c).

## QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals can legislate in contravention of the Constitution, Bankruptcy Act and General Orders of the Supreme Court.

2. What part of a Circuit Court opinion should be followed when that opinion conflicts within itself and is without *stare decisis*.

3. Is it the intent of Congress that the Circuit Court use ordinary bankruptcy procedures and limitations in Arrangement Proceedings under Chapter XI of the Bankruptcy Act?

## STATUTORY PROVISIONS, BANKRUPTCY RULES AND PROPOSED BANKRUPTCY RULES, GENERAL ORDERS INVOLVED

The statutes, bankruptcy rules and general orders are summarized below and where applicable they are set out in full in the appendix hereto.

11 U.S.C. 47, Bankruptcy Act, Section 24. This provides the jurisdiction of the Court of Appeals and the Supreme Court to review decisions and judgments of the Bankruptcy Court.

11 U.S.C. 104, Bankruptcy Act, Section 64. This section sets the schedule of payments from the bankrupt's estate.

11 U.S.C. 701, Bankruptcy Act, Section 301. This section sets forth the limitations of the Chapter XI proceedings.

11 U.S.C. 702, Bankruptcy Act, Section 302. This section applies the provisions of the first seven chapters of the Bankruptcy Act to Chapter XI proceedings where such provisions are not inconsistent.

11 U.S.C. 706, Bankruptcy Act, Section 306. This section sets forth the meaning of a plan of arrangement as used in Chapter XI proceedings.

11 U.S.C. 737, Bankruptcy Act, Section 337. This section, in Chapter XI sets forth the priority of distribution of the deposit that is provided for funding the plan of arrangement.

11 U.S.C. 742, Bankruptcy Act, Section 342. This provides for the debtor to continue in possession where no trustee or receiver has been appointed in the Chapter XI proceeding.

11 U.S.C. 743, Bankruptcy Act, Section 343. This permits the debtor in possession, upon authorization from the court, to operate and manage its business.

Bankruptcy Rule 219 is the rule that controls the attorney fees in ordinary straight bankruptcies and is set out in full in the appendix hereto.

Bankruptcy Rule 220 is the rule that allows the Bankruptcy Court to examine any fees paid or promised to be paid by the bankrupt to his attorney. It is set out in full in the appendix hereto.

Proposed Bankruptcy Rules for Chapter XI, numbered 11-31 and 11-32 are set forth in the appendix hereto.

General Order 44 sets forth the limitations and requirements that the Bankruptcy Court follows in appointing an attorney for the debtor in possession under Chapter XI of the Bankruptcy Act.

## STATEMENT OF THE CASE

### Facts

The Debtor and its subsidiary corporations were engaged in the business of distribution and warehousing of automotive, hardware, plumbing parts, supplies and accessories. The business was nationwide with major facilities in Cleveland, New York, Atlanta, Akron and Puerto Rico. The Company also operated 159 retail automotive parts and supply stores throughout the country and maintained a manufacturing plant in Pawtucket, Rhode Island. Its annual sales volume was in excess of $44 million. At the time of the filing of the proceedings under Chapter XI of the Bankruptcy Act, the Cle-Ware complex had assets of approximately $8½ million.

On February 18, 1971, Cle-Ware Industries filed proceedings for an arrangement under Chapter XI of the Bankruptcy Act and secured the dismissal of the receivership action, thus placing the Cle-Ware complex under the jurisdiction of the Bankruptcy Court. At the same time, Cle-Ware made application to the Bankruptcy Court for authority to continue in possession of its property as debtor-in-possession and to continue to operate its business. The Court granted the application and appointed two disinterested attorneys to represent the debtor-in-possession. On February 24, 1971, similar petitions and applications were filed on behalf of the nine wholly owned subsidiaries of Cle-Ware Industries. Again the Court permitted

the debtor to remain in possession to continue the operation of the companies; and the same disinterested attorneys were appointed to represent the debtors-in-possession.

There were various meetings between the attorneys for the debtor and the new investor group (The 1300 Group) which was to take over the operation of the debtor upon confirmation of the plan of arrangement. On several occasions during these meetings at the request of the 1300 Group and the demand of the Bank of the Commonwealth, the major secured party herein, the attorneys for the debtor gave an estimate as to the amount of their fees for legal services. On December 29, 1971, attorneys for debtor filed their application for compensation and attached thereto a complete itemization concerning the services rendered the debtor. The application detailed some 2,517 hours. Copies of the application were mailed to the 1300 Group through their attorney. Objections were filed by the 1300 Group and after a hearing and due consideration of the application for compensation of the attorneys of the debtor, and after oral arguments, and consideration of the briefs which were filed, the Bankruptcy Judge entered an order on July 11, 1972, allowing attorneys for the debtor the sum of $162,500.00 for legal services rendered the debtors. This was a reduction of $17,500.00 from the request.

Thereafter, the debtor companies petitioned the District Court for a review of the Bankruptcy Judge's order and to suspend execution thereof. The Bankruptcy Judge denied the motion to suspend execution and on November 20, 1972, the District Court affirmed the Bankruptcy Judge's order of allowance.

An appeal was perfected by these respondents to the Circuit Court of Appeals for the Sixth Circuit. On February 26, 1974, the Circuit Court reversed the order of the United States District Court and remanded the cause.

## REASONS FOR GRANTING THE WRIT

### 1. The Circuit Court Went Beyond the Judicial Power Granted to Them by the United States Constitution and the Laws of Congress.

The Circuit Court for the Sixth Circuit, when it rendered its decision and opinion, went beyond the judicial power of review granted by the United States Constitution and the laws of Congress. The Bankruptcy Act, Section 24a (11 U.S.C. 47) grants the Appellate Court jurisdiction to review judgments of the lower courts. It states:

> 24. Jurisdiction of Appellate Courts. a. The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less then $500, an appeal therefrom may be taken only upon allowance of the appellate court.
>
> b. *Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.*
>
> c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and order of the United States court of appeals in proceedings under this Act in accordance with

> the provisions of the laws of the United States now in force or such as may hereafter be enacted. (Emphasis supplied).

The Constitution and Section 24 of the Bankruptcy Act (11 U.S.C. 47) are devoid of any enabling clauses granting any court of appeals the right to legislate. Yet the Circuit Court of Appeals in its opinion did exactly that, for in Section III of its opinion (page 12) it held that only one attorney or set of attorneys for the debtor and debtor-in-possession may be permitted and compensated in a Chapter XI proceeding. They cite no precedent for this holding. The Bankruptcy Act (11 U.S.C. 1 thru 799) and the General Orders do not create this limitation. The limitation is being created and legislated by the Circuit Court. The Court therefore is usurping the function of Congress by decreeing this limitation and is going beyond the powers granted them by the Constitution and the Bankruptcy Act. Justice Marshall wrote in *Osborn v. United States Bank*, 9 Wheat. 738 (1824) at page 886:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are mere instruments of the law, and can will nothing.

The Circuit Court imposed their "will" by not citing any statutory law or case law to support their conclusion that only one attorney or set of attorneys can represent the debtor and debtor-in-possession in the Chapter XI proceeding in bankruptcy. There is no provision in the Bankruptcy Act dictating that one attorney or set of attorneys shall represent the debtor and the debtor-in-possession.

It is the court's duty to pass judgment on the issues presented to it. Justice Roberts wrote in *United States v. Butler*, 297 U.S. 1 (1936) at pages 62-63:

> All the court does, can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. The court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of the Constitution; and, having done that, its duty ends.

Nowhere in the Bankruptcy Act (11 U.S.C. 1 thru 799) does it say that the Circuit Court of Appeals can usurp the Congressional powers of the United States. Nor does it say that there can be only one attorney for a debtor and a debtor-in-possession. The debtor-in-possession is created pursuant to Section 342 of the Bankruptcy Act (11 U.S.C. 742) which states:

> Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this Act, subject, however, at all times to the control of the court and to such limitation, restrictions, terms, and conditions as the court may from time to time prescribe.

Further, General Order 44 reads:

> No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connection with the bankrupt or debtor, the creditors or any

other party in interest, and their respective attorneys....

There is no doubt that if a receiver or trustee instead of a debtor-in-possession were appointed by the court that he may retain counsel. See also *Matter of Owl Drug Company* (D.C.Nev. 1936), 16 F. Supp. 139. It has never been questioned that a receiver or trustee can employ counsel to represent him. See *Application of Pine Trees Associates*, 77 F. Supp. 270 (E.D.N.Y., 1948). But the appointment of counsel to represent the receiver, trustee or debtor-in-possession does not affect the debtor's right to have counsel.

If there is an attorney to represent the receiver or trustee that has been appointed under Section 342 (11 U.S.C. 742) then why should there not be a separate attorney for the debtor-in-possession when a debtor-in-possession is appointed. Otherwise why is the debtor-in-possession attorney set forth in General Order 44, and conversely why is the attorney for the debtor omitted. Obviously the general order contemplates separate attorneys for the debtor and the debtor-in-possession. Under this General Order and the Bankruptcy Act, the Bankruptcy Judge properly appointed counsel for the debtor-in-possession.

There is no requirement for the counsel appointed to represent the debtor-in-possession to be the same as the attorney for the debtor. The Circuit Court states "We see no valid reason why, as a general rule, his (debtor) representation in both capacities should not be limited to one attorney or set of attorneys." (Opinion, Ct. of App., p. 12.) The "one attorney" concept does not follow the dictates of General Order 44. That order is specifically limited to the debtor-in-possession attorney. The debtor's attorney is similar to an ordinary bankruptcy where the

bankrupt has his own attorney and the trustee has his own attorney.

The Circuit Court chose to create another clause in the Bankruptcy Act to the effect that there can only be one attorney or one set of attorneys in a Chapter XI proceeding. This, we contend, is legislating and is going beyond the power of the Circuit Court. If Congress had intended to have only one attorney in a Chapter XI proceeding it would have put it in the Bankruptcy Act, but since it did not, the Circuit Court cannot do so.

It is for this reason that the petition for Certiorari should be granted.

**2. The Decision Contains Conflicts Within Its Own Limits.**

The decision of the Circuit Court contains irreconcilable conflicts which appear to be unworkable. In the Conclusion on page 28 it states:

> In order to avoid the double expense of attorney's fees for bankrupt estates in this Circuit, we today announce the general rule that hereafter we will not approve the practice of appointing and compensating separate counsel for the debtor-in-possession and at the same time compensating the debtor's privately-retained counsel for legal services rendered after the filing of a petition for a plan of arrangement. We see no valid reasons, except in exceptional circumstances which we do not now foresee, why legal representation in both capacities should not be limited to one attorney or one set of attorneys.

It appears that the Court is saying that the debtor attorney's duties and responsibilities end with the filing of

a petition for a plan of arrangement. Yet in Section V, on page 21 of its opinion, it states:

> We emphasize that the attorneys for the debtor can be compensated only for those services normally performed by an attorney serving in that capacity. These include the following: the preparation and filing of the schedules and statement of affairs, the petition for arrangement and other applications and orders which were required except those relating to the operation of the business; appearances on behalf of the debtor in court proceedings; attendance at meetings of creditors to consider the proposed arrangement; preparation of the application and order for confirmation and attendance at hearings thereon; offering of the required proof of the "feasibility" of the arrangement and that it was in the best interests of creditors; and representation of the debtor in other hearings involving the adopting of the arrangement.

In this part of the decision the court sets forth the duties of the debtor's attorneys and the basis for compensation including considerably more than filing of the petition for a plan of arrangement.

It must be emphasized that the primary purpose of a Chapter XI proceeding is the creation of a new plan of arrangement, reorganizing and refinancing a company so that the business can survive. See *Re International Swimming Pool Corp.*, 186 F. Supp. 63 (D.C.N.Y., 1960), *White Chemical Co. v. Moradian*, 417 F.2d 1015 (9th Cir., Ariz., 1969), and *Nicholas v. United States*, 384 U.S. 594 (1966). It is the primary duty of debtor's attorney to aid the debtor in coming up with a plan of arrangement.

The Circuit Court is setting up a procedure whereby if one were to follow one part of the decision the debtor's attorney is finished when the petition for a plan of arrange-

ment is filed. But he is not finished if one were to follow the other part of the same opinion. The decision is clearly ambiguous and conflicting within itself.

The petition for a writ of Certiorari should be granted to clarify the meaning, however stated, of these apparent differences. The Court itself recognized the different functions of the attorney for the debtor and the attorney for the debtor-in-possession and by so doing points out the need for separate attorneys for debtor and debtor-in-possession.

### 3. The Circuit Court Applied Standards of Ordinary Bankruptcy to Chapter XI Proceedings.

Chapter I thru VII deal with ordinary bankruptcy procedure in which the bankrupt seeks adjudication in bankruptcy for the purpose of liquidation and distribution of its assets and discharge of its debts. Chapter XI provides for the proposal by debtor of an arrangement for settlement, satisfaction or extension of time of payment of unsecured debts for purposes of rehabilitating its business. Under this chapter the debtor does not seek adjudication; and liquidation and distribution are not contemplated during the administration of the Chapter XI proceedings. Under Chapter XI:

Section 301 (11 U.S.C. 701) states:

> The provisions of this chapter shall apply exclusively to proceedings under this chapter.

Section 302 (11 U.S.C. 702) states:

> The provisions of Chapter I to VII, inclusively, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter . . . .

To determine the applicability of any of the provisions of Chapter I through VII of the Bankruptcy Act to Chapter XI proceedings there are three tests that have been recognized. First, whether that provision *conflicts with a provision* under Chapter XI dealing with the same subject matter. Second, whether that provision of Chapter I through VII, although not in direct conflict with the provision of Chapter XI dealing with the same subject matter, nevertheless is *inconsistent with the effect of a provision* of Chapter XI. Third, whether the provision of Chapter I through VII, although not in conflict or inconsistent with the provisions of Chapter XI, are nevertheless, *inconsistent with the different theories* of Chapters I through VII and a proceeding under Chapter XI. Where there is no conflict or inconsistency under these tests, the provisions of Chapters I through VII are applicable in a Chapter XI proceeding. *Gramil Weaving Corp. v. Raindeer Fabrics Inc.*, 185 F.2d 537 (2d Cir., 1950).

The question is then does Section 64, under Chapters I through VII of the Bankruptcy Act (11 U.S.C. 104) conflict with or is it inconsistent with the provisions of Section 377(2) of Chapter XI (11 U.S.C. 737)? Section 64a (11 U.S.C. 104) reads in pertinent part:

> a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt's estate, and the order of payment shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition . . . and one reasonable attorney fee, for professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases . . .

Section 337(2) (11 U.S.C. 737) states:

> At such meeting, or at any adjournment thereof the judge or referee shall, after the acceptance of the arrangement . . . (2) fix a time within which the debtor shall deposit, in such place as shall be designated by and subject to the order of the court, the consideration, if any, to be distributed to the creditors, the money necessary to pay all debts which have priority, unless such priority creditors shall have waived their claims to such deposit or consented in writing to a provision of the arrangement for otherwise dealing with claims, and the money necessary to pay the costs and expenses of these proceedings; and . . .

This section was amended in 1958 in Public Law 85-732, 85th Cong., 2d Session. See Senate Report No. 2094, 85th Cong. 2d Session, expressly including fees and expenses of attorneys, accountants and agents within the definition.

Collier in his treatise on bankruptcy, COLLIER ON BANKRUPTCY, 14th ed., Volume 8, 5.34 (2.6) at page 715 states in discussing what the deposit should consist of:

> The debtor must deposit the money necessary to pay the compensation and expenses, as allowed by the court, of the attorneys, if any, for the receiver, the trustee, the debtor, the debtor in possession and the petitioning creditors . . .

He cites *In re Preston*, 89 F. Supp. 866 (S.D.N.Y., 1950), in support of this statement recognizing separate attorneys for the debtor and the debtor-in-possession.

The Circuit Court would have us believe that only one reasonable attorney fee is allowed. This holding seems to fall within the purview of Section 64a. The Circuit

Court cites no authority, and indeed does not even cite Section 64a of the Bankruptcy Act (11 U.S.C. 104) in support of its holding that only one attorney fee is allowed.

They stated:

> This court strongly disapproves the practice of appointing separate counsel as attorney for the debtor in possession and at the same time compensating another attorney at the expense of the bankrupt estate in his capacity as counsel for the debtor for services rendered after the filing of a petition for a plan for arrangement. Hereafter we will not approve this procedure as a general practice in the Sixth Circuit. (Opinion, p. 12)

Our inquiry is therefore, whether Section 64 under Chapters I through VII is inconsistent or in conflict with Section 337 (2) under Chapter XI? Does Section 64 apply to a Chapter XI Proceeding? Or does it conflict with or is it inconsistent with the theory of a Chapter XI proceeding?

The theory of ordinary bankruptcy is liquidation and distribution to the creditors. The theory of Chapter XI proceedings is not liquidation and distribution but a proposal of an arrangement. Section 306 (1), (11 U.S.C. 706) defines arrangment as "shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms." The differences between an ordinary bankruptcy and a Chapter XI proceeding then is the former is a cessation of activity and actual liquidation of the bankrupt, while the latter is a continuation of activity for the preservation of the debtor.

The functions of an ordinary bankruptcy attorney are to prepare the petition, schedules and statement of affairs and file them. He must also appear at the first meeting

of creditors. From that point on the trustee carries forward. The functions of a debtor attorney in a Chapter XI proceeding are "preparation and filing of the schedules and statement of affairs, the petition for arrangement and all other applications and orders which were required except those relating to the operation of the business; appearance on behalf of the debtor in court proceedings; attendance at hearings of creditors to consider the proposed arrangement; preparation of the application and order for confirmation and attendance at hearings thereon; offering of the proof of the 'feasibility' of the arrangement and that it is in the best interest of creditors; and the representation of the debtor in other hearings involving the adoption of the arrangement." (Opinion Ct. of App., p. 21.) The functions differ markedly from the functions of the debtor-in-possession attorney. The debtor's attorney must work to effect the rehabilitation of the debtor—his primary role is the actual development of a feasible plan of arrangement. On the other hand, the debtor-in-possession's attorney is an officer of the court whose primary function is to guide and counsel the debtor-in-possession while the debtor perfects the plan of arrangement. Further when the court appoints a debtor-in-possession under Sections 342 and 343 (11 U.S.C. 742 & 743) and General Order 44, the court may appoint attorneys to represent the newly created entity. The court creates this entity and has control over it. The debtor-in-possession attorneys have the duty of "legal services performed by them in connection with the operation of the business." (Opinion Ct. of App., p. 27.)

The Circuit Court therefore recognized the existence of the debtor as a pre-existing legal entity and the newly created debtor-in-possession as a court created legal entity and observed that each entity has separate and distinct functions. The court, however, failed to recognize that the debtor's attorney and the debtor-in-possession attor-

neys are also separate and distinct, having different functions. Further, if the decision of the Circuit Court becomes the law then they are in effect saying that Section 64 is applicable to Chapter XI proceedings.

Is this holding in conflict or inconsistent with the provisions and theory of Chapter XI? Under the second test, stated above, Section 64 is inconsistent with the *provisions* under a Chapter XI, because nowhere in the Sections of Chapter XI is there any limitation or requirement that there be only one attorney or one set of attorneys to represent the debtor and debtor-in-possession in an arrangement proceeding. On the contrary, the provisions of Chapter XI recognize that there are two legal entities, the debtor and the debtor-in-possession. Indeed the act itself recognizes the different functions of these entities.

Further, under the third test, stated above, Section 64a (11 U.S.C.A 104) is inconsistent with the *theory* of Chapter XI proceedings and the "economic spirit of frugality that underlies the Bankruptcy Act." (Opinion Ct. of App., p. 6.) The effects of this ruling may have the result of virtual elimination of any further arrangements with debtors-in-possession. Such elimination would also mean added expenses to the estate because under Sections 342 and 343 (11 U.S.C. 742 & 743) the court would then appoint receivers and trustees who are entitled to compensation and the trustees and receivers would have attorneys representing them who are also entitled to compensation—all at added expense to the estate.

*Proposed Bankrutcy Rules for Chapter XI Proceedings*

The proposed Bankruptcy Rules for Chapter XI proceedings indicate a preference for the use of debtor-in-possession. Proposed Rule 11-18 reads:

> (b) *Retention of Debtor-In-Possession; Appointment of Receiver.* Upon the filing of a petition under Rule 11-6 or 11-7, if no trustee in bankruptcy has previously qualified *the debtor shall continue in possession.* On application of any party in interest, the court may, for cause shown, appoint a receiver to take charge of the property and operate the business of the debtor. (Emphasis supplied)

This proposed rule follows the concept of economic spirit of frugality and furthers the purpose of a Chapter XI proceeding. The advisory Committee's Notes on this rule read in pertinent part:

> . . . In the absence of a bankruptcy trustee the proper chapter officer is either the debtor in possession or when necessary a receiver. When there is no bankruptcy trustee, *the court should continue* the debtor in possession unless there is some reason for the appointment of a receiver. (Emphasis supplied)

In the proposed rules there is no such limitation on attorney fees as the Circuit Court has dictated. Proposed Bankruptcy Rules 11-31 and 11-32, dealing with attorney compensation refer back to the existing Bankruptcy Rules 219 and 220.[1]

In both these rules there is no limitation as the Circuit Court held. Under these rules the bankrupt's or debtor's attorney can apply to the court for his compensation. This is exactly what happened in the case at bar. Further under Bankruptcy Rule 220 the court has the right and duty to examine the compensation already paid or promised to be paid or applied for by the bankrupt or debtor's attorney.

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1. Proposed Rules 11-31 and 11-32 and Rules 219 and 220 are set forth fully in the appendix, pp. 60 and 61.

Neither of these rules sets forth the "one fee concept" that the Circuit Court is dictating. They do require an application, examination and approval of the Bankruptcy Judge.

The tenor of the proposed rules not only follows the "economic spirit of frugality" for Chapter XI Proceedings but they encourage it and further the purposes of an arrangement. By allowing a debtor to continue in possession the cost of a receiver or trustee is avoided and as a result another layer of administrative expense is eliminated. The decision of the Circuit Court is inconsistent with current law and the philosophy of the proposed Bankruptcy Rules for Chapter XI Proceedings.

Since this case is one of the first impression, as witnessed by the lack of statutory and case support in the Circuit Court's opinion and since its holding has far reaching and wide spread effects it should be reviewed under the closest inspection. If the Circuit Court's decision is allowed to remain it will effect all future arrangements under Chapter XI and reorganization under Chapter X of the Bankruptcy Act. It is for these reasons that the writ of certiorari should be granted.

## CONCLUSION

The writ of certiorari should issue to review the judgment of the Court of Appeals for the Sixth Circuit for the following reasons:

1. The Circuit Court cannot legislate to create provisions in the Bankruptcy Act that do not now exist.

2. The Circuit Court opinion contains conflicts within its own confines that are not in conformity with the

procedure under the Bankruptcy Act and are not feasible for future arrangement proceedings using a debtor-in-possession.

3. The Circuit Court applied ordinary bankruptcy procedure to Chapter XI proceedings and used the same criteria for the payment of attorney fees. The procedure as mandated by the Circuit Court conflicts with the intent and purpose of an arrangement proceeding and should not be allowed to exist.

Respectfully submitted,

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# APPENDIX

## OPINION OF THE COURT OF APPEALS

(Decided and Filed February 26, 1974)

No. 73-1063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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In the Matter of
CLE-WARE INDUSTRIES, INC., et al., *Debtor.*

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CLE-WARE INDUSTRIES, INC., et al.,
*Appellants,*

v.

HOWARD SOKOLSKY, JEROME FRIEDLANDER, RICHARD PHILLIPS, FRANK WHALEN and the law firm of KOHRMAN AND JACKSON,
*Appellees.*

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Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

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Before PHILLIPS, Chief Judge, and CECIL, Senior Circuit Judge, and ALLEN, District Judge.*

PHILLIPS. Chief Judge. This is an appeal of an order of the District Court which affirmed an allowance of at-

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* Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

torneys' fees entered by a Bankruptcy Judge in a Chapter XI proceeding under the Bankruptcy Act. Jurisdiction is based on 11 U.S.C. § 47.

Few issues in bankruptcy administration are litigated so frequently as the question of attorneys' fees.[1] Yet few areas of bankruptcy law are as clouded by uncertainty about the meaning of statutes, rules and judicial opinions as the area of attorneys' fees. There is, however, agreement that the allowance of fees to an attorney depends largely upon the facts of each individual case.[2] The facts in the present case are set out at length because of the large number of bankruptcy law issues which they raise.

## I. The Facts

This proceeding was commenced on February 18, 1971, by the filing of a petition for an arrangement under Chapter XI of the Bankruptcy Act by Cle-Ware Industries, Inc. (Cle-Ware). Approximately one week later similar petitions were filed by nine subsidiary corporations of Cle-Ware. All of the corporations were encountering financial difficulties and sought court-assisted rehabilitation. For purposes of more efficient administration, the cases of the ten corporations were consolidated by the Bankruptcy Court on March 3, 1971.

The debtor corporations were involved in the nationwide distribution and warehousing of automotive parts and accessories and hardware and plumbing parts and supplies. Corporate facilities were operated in Cleveland, New York, Atlanta, California and Puerto Rico, while the

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1. See 3A *Collier on Bankruptcy* ¶ 62.12, at 1497-1505 (14th ed. 1971) for a list and discussion of controverted cases.

2. See 3A *Collier on Bankruptcy* ¶ 62.12, at 1489 (14th ed. 1971).

Cle-Ware Rayco, Inc. subsidiary maintained 159 retail outlets throughout the entire United States, in addition to a Rhode Island manufacturing plant. The total enterprise employed hundreds of people in various parts of the country and produced an annual sales volume of about $44 million.

At the time of the arrangement, unsecured creditor claims totaled over $15 million and secured creditor claims aggregated over $4 million. The plan of arrangement provided that secured creditors would be paid off completely and general creditors would receive five cents on the dollar with a stock option or the possibility of fifteen to twenty cents on the dollar for those who elected to take deferred payments. The Cle-Ware enterprise was revived by the plan of arrangement and is in full operation today.

When the arrangement proceedings began, the Bankruptcy Judge authorized the debtor-in-possession to continue to operate the corporate business. Attorneys Howard L. Sokolsky and Jerome Friedlander were appointed by the Bankruptcy Judge as counsel for the debtor-in-possession under a general retainer pursuant to General Order 44 of the General Orders in Bankruptcy.[3] These appoint-

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3. General Order 44 in Bankruptcy reads as follows:

"APPOINTMENT OF ATTORNEYS

No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the es-

(*Continued on following page*)

ments were made even though the debtor already had retained other counsel, namely Frank C. Whalen and the law firm of Kohrman and Jackson, who never applied to the Bankruptcy Judge for appointment pursuant to General Order 44. The debtor-in-possession and the debtor were one and the same parties, to wit, Cle-Ware and its nine subsidiaries.

The Bankruptcy Judge attempted "to establish rigid boundaries in which the debtor-in-possession was to operate the Cle-Ware empire." Believing that creditors had little faith in the debtor's ability to operate the corporate business successfully, the Bankruptcy Judge required counsel for the debtor-in-possession to devote their legal skills "to overseeing the entire management of the business in order to protect the assets and prevent losses." To attain this result, the Bankruptcy Judge required that all Cle-Ware expenditures "be made only upon application and

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Footnote continued—

tate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors, or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77, when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees of the creditors of the corporation."

order of the Court." Over an eight month period from February 1971 to October 1971, there were 2,487 of these applications submitted to and approved by the Bankruptcy Court.

After a plan of arrangement for all debtors was confirmed by the Bankruptcy Judge on October 13, 1971, the applications for attorneys' fees, which are the subject of this appeal, were filed. Sokolsky and Friedlander, counsel appointed by the court to represent the debtor-in-possession filed a joint application seeking $200,000 compensation. Whalen and the firm of Kohrman and Jackson at the same time filed an application for $180,000 in compensation as attorneys for the debtor.

The attorneys for the debtor also represented Gerald Levine, who owned 165,992 shares of the 394,000 outstanding shares of Cle-Ware stock. They represented Levine in his personal stock negotiations with various parties, including several persons known collectively as the 1300 Group, to whom Levine sold his Cle-Ware stock by an agreement also concluded on October 13, 1971.

The debtor companies, through their new management, filed written objections to the application submitted by the four sets of attorneys, raising serious factual questions about the claims. As to the attorneys for the debtor, it was charged, among other things, that (1) certain of their services were duplicated by the services rendered by attorneys for the debtor-in-possession or should have been rendered by the latter attorneys; and (2) extensive services were rendered on behalf of their personal client, Gerald Levine, the principal stockholder of Cle-Ware, which were not compensable in the bankruptcy proceedings. As to the attorneys for the debtor-in-possession, it was objected that they had failed to document their

services with detailed time records. As to all attorneys, it was charged that they claimed compensation for extensive ministerial and administrative services that were not properly compensable as "professional services," and that counsel had duplicated much work of the administrative personnel of the debtor-in-possession and of each other. Without conducting any evidentiary hearing as to these issues of fact, the Bankruptcy Judge allowed a fee of $162,500 to the attorneys for the debtor and $197,500 to the attorneys for the debtor-in-possession.

The following schema outlines the requests and allowances for the respective attorneys:

| Client | Attorneys | Court Approved | Requested Compensation | Allowance |
|---|---|---|---|---|
| Debtor | Whalen and the firm of Kohrman and Jackson | No | $180,000 | $162,500 |
| Debtor-in-Possession | Sokolsky and Friedlander | Yes | $200,000 | $197,500 |
| | | Total Allowance | | $360,000 |

The appellant debtor companies then petitioned the District Court to review the Bankruptcy Judge's order and to suspend execution thereof, citing as errors the objections to the fee applications that had been overruled by the Bankruptcy Judge and the Bankruptcy Judge's failure to hold an evidentiary hearing. The District Court on November 20, 1972, affirmed the Bankruptcy Judge's Allowance of Fees and Second Order of Distribution in a five line order. From that order, this appeal has been perfected.

## II. Principles Governing Bankruptcy Fee Allowances

In determining whether the fees awarded counsel were excessive, we are guided by the economic spirit of frugality that underlies the Bankruptcy Act. In *In re Mt. Forest Fur Farms of America, Inc.*, 157 F.2d 640, 644 (1946), this court, speaking through Judge Martin, said:

> ". . . the policy of the Bankruptcy Act, manifest in all its provisions regarding expenses and fees, is to reduce to a minimum the cost of administering estates, . . . . the courts are bound to give the statute such construction and application as will fulfill the intention of Congress. In re King, D.C.W.D.Tenn., 11 F.Supp. 351, 357. Among other authorities, reference was made to the opinion of Mr. Justice Cardozo in Realty Associates Corporation v. O'Connor, 295 U.S. 295, 299, 55 S.Ct. 663, 79 L.Ed. 1446, where he declared for the unanimous court that extravagant costs of administration in winding up estates in bankruptcy have been denounced as crying evils; that, in response to those complaints, Congress had attempted to fix the limit for expenses growing out of the services of referees and receivers; and that a court should not forget that Congress meant to hit the evil of extravagance, wherefore the meaning of the words of the Bankruptcy Act if doubtful, must be adapted to its aims."[4]

More recently, Bankruptcy Judge Asa S. Herzog has written as follows:

> "There is . . . one overriding principle which governs bankruptcy fees and overshadows all other can-

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4. For other statements of this court demonstrating our long-standing adherence to "the economical spirit of the Bankruptcy Act," see, e.g., *Butzel v. Webster Apartments Co.*, 112 F.2d 362, 367 (1940), and *Page v. Rogers*, 149 F. 194, 195 (1906), *rev'd on other grounds*, 211 U.S. 575 (1909).

ons. This is the economy principle, often referred to as the 'Economic Spirit of the Act' . . .

* * * * *

"Economy in administration is now axiomatic, and . . . it is sufficient to note that the Supreme Court has denounced extravagant costs of administration as a 'crying evil' and has warned against 'vicarious generosity.'

"The importance of the economy principle is that it modifies the business standards which ordinarily are the measure of fees. *Bluntly, fees in bankruptcy cases must be considerably lower than the compensation of those engaged in private practice.*" Herzog, "Fees and Allowances in Bankruptcy", 36 Conn. B.J. 374, 376-377 (1962). (Emphasis added and footnotes omitted.)

3A *Collier on Bankruptcy*, ¶ 62.12, at 1491-93, (14th ed. 1971) analyzes the elements which, in addition to the economy principle, should be used to determine the reasonable value of services rendered by counsel:

"In determining the reasonable value of services rendered by an attorney the following elements are to be considered: *'The time spent, the intricacy of the problems involved, the size of the estate, the opposition met, the results achieved,—all subject to the economical spirit of the Bankruptcy Act.'* In view of the primary purpose of bankruptcy liquidation it is not suprising to find that, aside from the principle of economy, the *results achieved* constitute the factor of greatest determinative weight.

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This implies that (1) great success and benefit to the estate commands a liberal compensation, and (2)

all effort and labor may go virtually without reward where no benefit accrued to the estate. *Benefit to the estate* as a yardstick for measuring the value of attorneys' services has been recognized by the Supreme Court in *Randolph v. Scruggs.* [190 U.S. 533 (1903)] But even where the estate undoubtedly benefitted, for instance where the total amount of claims was reduced thanks to counsel's efforts, there may be at least two reasons for reducing his compensation as earned by the benefit conferred. One is the estate's financial inability to carry the burden of an adequate remuneration. The other, again an offshoot of the everpresent economy doctrine, may be the fact that counsel for trustee or receiver in performing certain services, for instance contesting claims against the estate, acted not only on behalf of the estate, but also on behalf of creditors, individual or groups." (footnotes omitted)

The United States District Court for the Northern District of Ohio has codified the factors to be considered in determining counsel's compensation in its Bankruptcy Rule 12(c), which provides as follows:

"Among the factors to be taken into consideration in determining the compensation to be allowed to attorneys entitled thereto by law are the following:

(1) The amount of work done.

(2) The difficulties or intricacies of the problem presented.

(3) The skill required and experience of counsel in similar cases.

(4) The results accomplished.

(5) The amount involved in connection with the services rendered.

(6) The size of the estate.

(7) The length of time consumed.

(8) Contingency or certainty of compensation."[5]

Finally, we state the standard of review which we apply in considering orders of the Bankruptcy Court which have been confirmed subsequently by the District Court. This court has held consistently that the findings of fact by a Bankruptcy Judge will not be reversed unless they are clearly erroneous. *In re Nelson & Sons, Inc.*, 426 F.2d 235 (6th Cir. 1970); Rule 52(a), Fed. R. Civ. P. In *In re Nelson*, the District Judge filed an extensive opinion and order in which he detailed his reasons for confirming the findings of the referee, and we cited approvingly *Cunningham v. Elco Distributors*, 189 F.2d 87 (6th Cir. 1951), wherein we said:

> "No principle has been more firmly established in this circuit than that concurrent findings of the referee in bankruptcy and the district judge are not to be set aside, except upon clear demonstration of mistake." 189 F.2d at 88-89.

In the present case, the District Judge incorporated the opinion of the Bankruptcy Judge and confirmed the Bankruptcy Judge's allowance of fees.

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5. Subsequent to the Bankruptcy Judge's fee allowance in this case, the local Bankruptcy Rules of the Northern District of Ohio were reformulated, and the factors to be considered in determining counsel's compensation were set forth in new Rule 8. This new rule, which went into effect on January 15, 1973, added two additional factors: 1) the expeditious performance of legal services, and 2) the professional quality of services rendered.

### III. Fundamental Error of Bankruptcy Court

The basic mistake of the Bankruptcy Court involves an issue of law and procedure. The fundamental error of the Bankruptcy Judge grew out of his mistaken conception that, even though the same party is both debtor and debtor-in-possession, separate counsel must be appointed to represent the debtor-in-possession in all cases.

The Bankruptcy Judge expresses this concept in his opinion as follows:

> "Since, in the opinion of this Court, there is always a possibility, however remote, of conflict of interest between the separate entities of debtor and debtor-in-possession, this Court has always appointed, upon proper application, separate counsel from that of the debtor. The possibility of conflict is thereby removed to the satisfaction and peace of mind of both entities, the creditors, the public and the Court. The economical spirit of the Bankruptcy Act is also preserved because when one attorney wears two hats by serving two masters, in addition to the possibility of conflict, his fees are based upon the performance of two separate functions."

Appellants assert that the practice of appointing and compensating separate attorneys for the debtor-in-possession and also compensating the privately-retained attorneys for the debtor is unique to the Northern District of Ohio. This Court is aware of the distinction between the duties of counsel for the debtor and counsel for a debtor-in-possession, as discussed more fully below, but we disagree with the practice in the Northern District of Ohio. Bankruptcy Judges in other Circuits and Districts also reject this practice.

For example, Bankruptcy Judge Asa S. Herzog of the Southern District of New York finds "absolutely nothing" to support the practice employed in the Northern District of Ohio, saying:

> "A debtor is defined as a person who could become a bankrupt under § 4 of the Act and who files a petition for an arrangement. Where there is no receiver or trustee, the debtor 'shall' continue in possession of his property and 'shall' have the title and exercise the powers of a bankruptcy trustee. Thus, unless there is a receiver or trustee, the debtor automatically becomes a debtor in possession. The debtor and debtor in possession are treated as separate and distinct entities.
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> * * * * *
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> "But the debtor does not cease to exist as such when he files his petition for arrangement and spontaneously becomes a debtor in possession. The two entities exist side by side until the conclusion of the proceeding. The debtor in possession may be authorized to operate the business and manage the property of the debtor (§ 343), and may be authorized to borrow money, etc. and issue certificates of indebtedness therefor (§ 344), or to lease or sell property of the debtor [§ 313(2)]; but it is the debtor who proposes the arrangement (§ 323), is examined at the meeting of creditors [§ 336(3)], and makes the deposit necessary to effect the arrangement [§ 337(2); § 362(2)].
>
> "Thus the attorney retained to file the petition usually acts in two capacities, concurrently representing the debtor in effecting an arrangement and the debtor in possession in the exercise of the powers of a bankruptcy trustee and in all things in connection with the conduct of the business.

*"I do not think it was intended that the debtor be represented by one attorney and that in his capacity as debtor in possession, he must be represented by an entirely different attorney. There is absolutely nothing to support such a view.* The fact remains, as I have indicated, that the debtor in possession is not a trustee. He may possess the title and powers of a trustee and his position may be 'for all practical purposes' that of a trustee; he may be a 'court officer analogous' to a trustee; but he is not the independent trustee appointed pursuant to § 44 of the Act. *I cannot conceive of the debtor so dimidiated that he requires different counsel each time he changes hats!*

* * * * *

"As a matter of common practice, the attorney representing the debtor and the debtor in possession files a single application reciting all the professional services rendered by him in both capacities."

Herzog, "Bankruptcy Law—Modern Trend". 37 Ref. J. 110-12 (1963). (Emphasis added and footnotes omitted.)

Bankruptcy Judge William Rudin of the Eastern District of New York, states that "I fix one fee to cover all the services rendered" by the attorney for the debtor and the attorney for the debtor-in-possession. Although there is a statutory distinction between the person designated as attorney for the debtor and the attorney for the debtor-in-possession, Judge Rudin says, "[H]e is, of course, one and the same person. . ." Rudin, "Allowance in Chapter XI Proceedings," 40 *Ref.J.* 29, 30 (1966).

This court strongly disapproves the practice of appointing separate counsel as attorney for the debtor-in-possession and at the same time compensating another

attorney at the expense of the bankrupt estate in his capacity as counsel for the debtor for services rendered after the filing of a petition for a plan of arrangement. Hereafter we will not approve this procedure as a general practice in the Sixth Circuit. Only in exceptional circumstances, which we do not now foresee, will this procedure be allowed by this court. The debtor and the debtor-in-possession is one and the same person, although "wearing two hats." We see no valid reason why, as a general rule, his legal representation in both capacities should not be limited to one attorney or one set of attorneys. In the ordinary situation, as in the instant case, there is no actual or potential conflict of interest requiring or justifying payment for services of separate attorneys.

In the present case, however, we are confronted by a situation where an able and experienced Bankruptcy Judge has followed this practice in accordance with previously established precedent in his District at a time when there was no precedent to the contrary in this Circuit. Two sets of attorneys have devoted considerable time and effort in this Chapter XI proceeding which resulted in the confirmation of a Plan of Arrangement continuing the economic life of Cle-Ware and its subsidiaries. The Bankruptcy Judge avoided the considerable expenses of a receivership, yet kept the debtor corporations functioning as a continuing enterprise.

Appellants contend that no fee should be allowed to counsel for the debtor. This appears to be a question of first impression in this Circuit and we apply today's rule only prospectively. We are unwilling to make this rule applicable in the present case of the obvious inequities that would result.

Instead we reverse the decision of the District Court and remand with directions to fix a reasonable fee in this particular case for counsel for the debtor and a reasonable fee for counsel for the debtor-in-possession, the total of which shall not exceed a reasonable fee which would be allowable to one attorney, representing the debtor corporations in their capacities as both debtor and the debtor-in-possession.

On remand, we direct that an evidentiary hearing be conducted on the objections of the debtor corporations, that counsel be required to substantiate their fee requests under the guidelines set forth in this opinion, and that the objecting parties be afforded the right of cross examination of the claimant attorneys.

The procedure to be followed on remand with regard to the respective fees in this particular case is set forth more fully in Sections V and VI of this opinion.

## IV. General Order 44

Appellants further contend that no fee can be allowed to the attorneys for the debtor because they were not appointed by the Bankruptcy Court pursuant to General Order 44.[6]

General Order 44 provides that "no attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court." This provision does not on its face cover an attorney for a debtor who is

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6. For a complete text of General Order 44, see n. 3. The litigants stipulate that General Order 44 is applicable to this case although the United States Supreme Court abrogated the General Order effective October 1, 1973, when it implemented its new Rules of Bankruptcy Procedure. A compilation of the new bankruptcy rules relevant to the issues raised in this case is contained in an appendix to this Opinion.

*not* in possession. 8 *Collier on Bankruptcy* ¶ 5.34, at 716 (14th ed. 1971) states as follows:

> "General Order 44 does not apply to an attorney for a debtor not in possession, or to an attorney for a bankrupt prior to the filing of a Chapter XI petition under § 321 in a pending bankruptcy proceeding."

In support of their contention with respect to General Order 44, appellants rely primarily on *In re Hydrocarbon Chemicals Inc.*, 411 F.2d 203 (3rd Cir. in banc), *cert. denied* 396 U.S. 823 (1969). We find that decision to be factually distinguishable and not controlling in the case at bar.

In *In re Hydrocarbon Chemicals*, the matter was originally a Chapter XI proceeding and subsequently was converted to a Chapter X proceeding. While in Chapter XI, the Bankruptcy Court appointed a receiver who retained two sets of attorneys on order of the court. Thereafter, the fee claimants—attorneys who were retained by the debtor's attorney without court approval—settled claims of creditors and removed the Government's jeopardy tax assessment. A majority of the judges of the Third Circuit determined that such services "were clearly among the duties of the receiver which should have been performed by him and his attorneys." 411 F.2d at 206.

## V. The Fee of Counsel for the Debtor

The Bankruptcy Judge allowed the attorneys for the debtor, Frank C. Whalen and the law firm of Kohrman and Jackson, a compensation award of $162,500. In addition to the grounds referred to above, the appellants object to the fee allowance for these attorneys on the following grounds: 1) Some of the compensated services were performed not for the debtor but for its principal shareholder, Gerald Levine; 2) These attorneys performed ministerial

and administrative services not properly compensable as professional services; 3) These attorneys duplicated services performed by the attorneys for the debtor-in-possession; and 4) The compensation award to these attorneys was clearly excessive.[7]

The legal services alleged to have been performed for the personal benefit of Gerald Levine constitute one of the most troublesome issues raised on this appeal. Gerald Levine was the principal stockholder of Cle-Ware, owning 165,992 out of 394,000 shares issued as of October 13, 1971. On that date he entered into an agreement with several persons known collectively as the 1300 Group whereby Levine sold his stock and transferred his voting rights. The contract provided for the sale of Levine's stock at $10 per share for a total of $1,659,920 and a collateral agreement for the employment of Levine by Cle-Ware under its new management. Repayment of Levine's debt to Cle-Ware of $40,000 was delayed over a five year period. Levine reaped these benefits from the transaction while unsecured creditors with claims exceeding $15 million were paid only five cents on the dollar in cash under the terms of the Plan of Arrangement. So far this record discloses, Levine received all these benefits without assuming personal liability for any attorney's fees.

Appellants assert that these attorneys were compensated for 573 1/3 hours spent on the negotiation and sale of Levine's Cle-Ware stock to the 1300 Group. Beginning in April 1971, these attorneys met occasionally with the members of the 1300 Group to negotiate what became the ultimate agreement with the group. There-

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7. The appellants also raise the last three objections to the fee allowance to counsel for the debtor-in-possession. The principles stated in this section with respect to these objections are equally applicable in the forthcoming section dealing with the fee of counsel for the debtor-in-possession.

after, there were frequent conferences among these attorneys, members of the group and Levine.

It is undisputed that the debtor corporations were not parties to the Levine-1300 Group agreement and that Levine was represented by the same counsel who here seek compensation as attorneys for the debtor. Further, the record reveals that *all* the time devoted by counsel to fashioning this agreement was included in their application for allowance as attorneys for the debtor.

It is clear that attorneys entitled to fees for services in bankruptcy and Chapter XI proceedings will have their fees reduced proportionately where their services were partly performed on behalf of private clients. 3A *Collier on Bankruptcy* ¶ 62.12, at 1493 (14th ed. 1971) states:

> "While an attorney's association with other parties in interest does not necessarily prevent his appointment as counsel for the estate, yet it may cause him to suffer a reduction of his compensation out of the estate on the ground that certain services are considered to have been rendered for the benefit of his private clients rather than for the estate."

Further, *Collier* adds:

> "Where there is such a multiplicity of beneficiaries of one particular service, courts are anxious to see in the estate only a kind of secondary beneficiary of efforts made primarily for, and therefore to be compensated by, the directly interested creditors." (footnote omitted.) *id.*

Similarly, the record in this case indicates that a major portion, if not all, of the disputed 573 1/3 hours represents time spent by these attorneys rendering legal services for Levine and not for the debtor. On remand, these

disputed items should be reviewed item-by-item before a determination is made as to which, if any, are properly chargeable to the debtor. No compensation should be allowed for any services found to have been rendered to Levine as an individual.

The appellants' second objection to the compensation award to the attorneys for the debtor is that the award represents compensation for ministerial and administrative services not properly compensable as professional services within the meaning of General Order 42. General Order 42 provides as follows: "No allowance of compensation shall be made to any attorney for a receiver, trustee or debtor in possession except for professional services."[8]

The standards of professional services are set forth in 3A *Collier on Bankruptcy* ¶ 62.12, at 1481-82 (14th ed. 1971):

> "The services for which an attorney for a receiver or trustee may claim compensation are scarcely more susceptable of exhaustive definition than are the administrative duties of his client. Only *professional* services, it is true, are entitled to compensation, and General Order 42 is clear enough not to leave any room for a charge for non-professional services, such as services of a commercial or clerical nature, or as accountant, even if this charge be made at a rate which in no wise differs from the rate the officer would have to pay if the services were rendered by a non-lawyer. However, within the scope of the term 'professional services' the conceivable variety of legal

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8. Although General Order 42 was abrogated by the Supreme Court effective October 1, 1973, it is nevertheless applicable to this case, the facts of which transpired in 1971 and in which fees were allowed in 1972. For the text of the relevant Rule of Bankruptcy Procedure which has superseded General Order 42, see the appendix.

services is co-extensive with the activities of the officer himself . . . The allowance of compensation for such services may be said to be governed by one leading test: wherever the officer (trustee or receiver) is by the statute either *directed* or in his sound discretion *permitted* to act, and where the compliance with his duties or the exercise of his privileges require legal advice or assistance, the estate is chargeable with a reasonable allowance of the officer's attorney, if retained by leave of court, in respect of all services reasonably warranted by the circumstances of the case." (footnotes omitted)

Judge Learned Hand observed in *In re Eureka Upholstering Co.*, 48 F.2d 95, 96 (2d Cir. 1931):

> "In conclusion, we cannot ignore the curious notion which this application discloses that an attorney may recover for what are not legal services at all. For example, in the petition at bar are items for arranging for the sale of the assets, hiring truckmen to carry back concealed property to the bankrupt's place of business, safeguarding the property, going along with the truck, checking upon what was found, stirring up a criminal prosecution, getting hold of an accountant, collecting accounts due, inquiring of a pledgee of accounts as to any equity, examining the bankrupt's papers, and more of the sort. The implication behind these claims is that the receiver's attorney may recover, as for legal services, for discharging the duties of the receiver himself. This is an error, . . . ."

This objection primarily is applicable to Exhibit B of the application of the attorneys for the debtor-in-possession, *infra*. The appellants assert that the following activities of counsel for the debtor are not compensable as professional services: 1) customer relation and investiga-

tion; 2) meetings with employees of subsidiaries; 3) continued representation of the debtor as corporate counsel; 4) furnishing information and documents to the Securities and Exchange Commission; and 5) work with a public relations specialist.

We emphasize that counsel for the debtor are not entitled to be compensated for any services outside the scope of the customary duties of counsel for the debtor as detailed at the end of this Section V. When the Bankruptcy Court approved counsel for the debtor-in-possession, those attorneys, and not the attorneys for the debtor, became the only attorneys who could be compensated for rendering legal services for the operation of the bankrupt estate. On the record before us, this court cannot determine on this appeal whether any or all of the five activities enumerated above should be classified as professional services. This issue is to be determined on remand. We observe, however, that all of the five enumerated above, even if classified as professional services, appear to involve services in the administration of the bankrupt estate. As such, they are not compensable to counsel for the debtor.

On remand, the District Court should review each of the items for which these attorneys request compensation to determine whether (1) they constitute professional services, and (2) if so, which counsel should be compensated for such services as falling within the scope of their respective duties. The compensation of attorneys for the debtor should be limited to legal services which it is the duty of the attorneys for the debtor to provide. In no event should compensation be allowed to any attorney for services other than professional services.

The appellants' third objection to the compensation award to the attorneys for the debtor is that the award represents compensation for duplicated services. The ap-

pellants contend that the total award was bound to skyrocket once the Bankruptcy Court permitted allowance of compensation to separate sets of attorneys for the debtor and the debtor-in-possession. Appellants cite several cases wherein courts reduced fees where it was found that separate sets of attorneys performing overlapping services burdened the estate. *See, e.g., Official Creditors' Committee of Fox Market, Inc. v. Ely*, 337 F.2d 461 (9th Cir. 1964); *In re Solar Mfg. Corp.*, 215 F.2d 555 (3rd Cir. 1954).

With respect to the employment of several attorneys which results in duplication of services, 3A *Collier on Bankruptcy* ¶ 62.12, at 1506 (14th ed. 1971) states:

> "Only *one* reasonable attorney's fee is provided for, irrespective of the number of attorneys employed. There is no such statutory protection against duplication or multiplication of legal services rendered to the trustee or receiver. In this respect, however, the courts have reached results in harmony with the statutory principle. They have not only denounced duplication of services generally, applying as a sanction the denial of compensation, but they decided to allow in much the same way *one* attorney's fee only, wherever several attorneys rendered the estate services that could have been rendered by a single attorney." (footnote omitted)

Counsel for the debtor and counsel for the debtor-in-possession cannot be compensated for rendering the same service. In the item-by-item review on remand of the applications submitted by both sets of attorneys, fees to debtor's counsel should be limited to those legal services which they provided and which are within the scope of their duties. Similarly, the District Court should allow fees to counsel for the debtor-in-possession for those legal

services which they provided and which are within the scope of their duties.

The appellants' final objection to the compensation award to the attorneys for the debtor is that the Bankruptcy Judge abused his discretion in allowing $162,500 in fees since this amount was clearly excessive and inconsistent with the economical spirit of the Bankruptcy Act. In support of this objection, the appellants assert that counsel for the debtor requested compensation at an hourly rate of about $71[9] (2,517 hours for a requested $180,000). Further, these rates are alleged to be substantially higher than the prevailing rate recommended by the local bar association.

Although the Bankruptcy Judge noted the factors to be taken into consideration in determining the reasonableness of a fee stated in local Bankruptcy Rule 12(c) and referred to a relevant disciplinary rule of the local bar association, he apparently accepted the proffered hourly rate without receiving evidence on what it should be. The Bankruptcy Judge attributed "the incomparable skill and expertise of these learned scholars and able practitioners [counsel for the debtor]" as being the primary factor in resuscitating Cle-Ware. The "masterful job" of these attorneys resulted in general creditors receiving five cents on the dollar with a stock option or the possibility of fifteen to twenty cents on the dollar for those who elected to take deferred payments.

Assuming, without deciding, that this was a "masterful job," the Bankruptcy Judge clearly erred in making the compensation award without "opinion evidence touching the reasonableness of the fee." See *In re Barceloux*, 74

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9. Counsel for the debtor-in-possession requested compensation at an hourly rate of $50, *infra*.

F.2d 288, 294 (9th Cir. 1935). At the hearing to be conducted on remand, opportunity should be provided the litigants to introduce such opinion evidence.

Consistent with the above reasoning, we find it difficult to conceive any situation which would justify awarding these attorneys compensation in excess of the hourly rate recommended by the local bar association for such bankruptcy work, however "masterful" the job. Attorneys who take bankruptcy work do so with advance knowledge that they cannot expect the highest of fees, especially in cases such as this, where the general creditors are paid only five cents on the dollar in cash and face the prospect of receiving no more than twenty cents on the dollar.

We reemphasize that the attorneys for the debtor can be compensated only for those services normally performed by an attorney serving in that capacity. These include the following: the preparation and filing of the schedules and statement of affairs, the petition for arrangement and all other applications and orders which were required except those relating to the operation of the business; appearances on behalf of the debtor in court proceedings; attendance at meetings of creditors to consider the proposed arrangement; preparation of the application and order for confirmation and attendance at hearings thereon; offering of the required proof of the "feasibility" of the arrangement and that it was in the best interests of creditors; and representation of the debtor in other hearings involving the adoption of the arrangement.[10]

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10. For further discussion of the customary duties of counsel for the debtor, see Rudin, "Allowances in Chapter XI Proceedings," 40 *Ref. J.* 29 (1966) and 8 *Collier on Bankruptcy* ¶ 6.25, at 945-48, (14th ed. 1971).

Accordingly, we reverse the order of the District Court affirming the compensation award to counsel for the debtor, Whalen and the firm of Kohrman and Jackson, and remand for a hearing on the objections raised by the appellants and for determination of a reasonable fee consistent with the principles herein stated.

## VI. Fee of Counsel for the Debtor-in-Possession

The court appointed attorneys for the debtor-in-possession, Sokolsky and Friedlander, were granted a compensation award of $197,500 by the Bankruptcy Judge.

The attorneys for the debtor-in-possession based their fee application on two exhibits. Exhibit A sets forth a chronology of work performed showing the time in most cases attributed to each task. Compensation was calculated at the rate of $50 per hour, and the fees claimed by counsel based on Exhibit A services aggregated $102,669. Exhibit B detailed a listing of 8,842 entries contained in 2,487 applications presented to the Bankruptcy Court for approval and authorization of checks to be issued by the debtor-in-possession.[11] The expenditure applications granted by the Bankruptcy Court during this period totaled $10,762,176.40. The fee claimed by these attorneys based on the services represented by Exhibit B aggregated $97,301.

The appellants raised numerous objections to the fee application of these counsel and requested that an evidentiary hearing be held on these objections. The Bankruptcy Court rejected the objections and failed to grant

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11. This was the procedure which implemented the Bankruptcy Court's request that every expenditure of the bankrupt could be made only upon application to and order of the Bankruptcy Court.

an evidentiary hearing prior to allowing these attorneys a fee of $197,500.[12]

The appellants allege that the Bankruptcy Judge erred for the following reasons: 1) The attorneys for the debtor-in-possession failed to document their fee application with time records for a major portion of their services, 2) The attorneys for the debtor-in-possession performed ministerial and administrative services not properly compensable as professional services, 3) The attorneys for the debtor-in-possession duplicated services already performed by the attorneys for the debtor, and 4) The compensation award to the attorneys for the debtor-in-possession was clearly excessive.

With respect to the first assignment of error, the record indicates that these attorneys failed to document with time records over one-quarter of their claims represented by Exhibit A and all of their claims represented by Exhibit B. Section 62(d) of the Bankruptcy Act, in relevant part, requires:

> "A receiver or trustee or the attorney for any of them, or any other attorney, seeking compensation for services rendered by him in a proceeding under this title or in connection with such proceeding, shall file with the court his petition setting forth the value and extent of the services rendered, the amount requested, and what allowances, if any, have theretofore been made to him." 11 U.S.C. § 102(d).

This statutory provision was implemented by Rule 12(a) of the Bankruptcy Rules of the District Court which, in pertinent part, provides:

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12. This award represented $102,699 for services represented in Exhibit A and $94,801 for services represented in Exhibit B.

> "A detailed statement shall be attached to each application for attorney's fees, *showing the items of service rendered, with the charge and date for each item,* unless in any given case the Court finds that such itemization is not practicable and directs that it may be dispensed with . . ." (emphasis supplied)

The Bankruptcy Court never found that the keeping of time records was not practicable and never excused the keeping of such records, nor did the Bankruptcy Judge say why he considered the records not kept by counsel more "unreasonable and extraordinarily costly" than the time records they did keep.

The importance of the statutory requirement and the local rule are underlined by 3A *Collier on Bankruptcy* ¶ 62.38, at 1641-42 (14th ed. 1971) wherein counsel is advised to consider the following admonition:

> "Appointees of the court, whether receiver, trustee, or attorney, must expect their claims to be closely scrutinized by the debtor, the creditors, and by the court, and they should be meticulous in keeping accurate accounts of the various items and elements which go to making up their claim. It will not do to state in a general way services performed, and then ask a bulk allowance." *In re National Accessories, Inc.*, 13 F. Supp. 278, 281 (D.C. Neb. 1936).

Many decisions recognize that the keeping of accurate time records by attorneys in bankruptcy proceedings is indispensable. For example, *see, In re Roustabout Company,* 386 F.2d 354 (9th Cir. 1967); *Miller v. Robinson,* 378 F.2d 2, 3 (9th Cir. 1967); *In re General Economics Corporation,* 360 F.2d 762, 765 (2d Cir. 1966); *In re Hudson & Manhattan Railroad Co.,* 339 F.2d 114, 115 (2d Cir. 1964).

Chief Judge Lumbard said in *Hudson & Manhattan Railroad*:

> "We wish to emphasize that any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent. Lawyers are well aware that, especially where services of the nature here involved are spread over a period of time and ultimate payment is virtually assured, they are valued principally on the basis of the time required. There is no excuse for an established law firm to rely on estimates made on the eve of payment and almost entirely unsupported by daily records or for it to expect a court to do so." 339 F.2d at 115.

Without the time records to document all the services represented by Exhibit A and with no inkling of an idea of how much time counsel spent on legal services represented by Exhibit B, we find it impossible to determine if the compensation award to the attorneys for the debtor-in-possession was reasonable. Absent this evidence, the Bankruptcy Judge clearly erred in rendering a compensation award of $197,500.

At the evidentiary hearing on remand the Bankruptcy Court should require counsel for the debtor-in-possession to establish the amount of time actually spent by them on the items listed in Exhibit A for which there are no time records and the role of counsel in preparing and submitting the Exhibit B applications to the court for approval of expenditures by the bankrupt.

The appellants' second assignment of error with respect to the compensation awarded to the attorneys for the debtor-in-possession is that the award represents compensation for ministerial and administrative services not prop-

erly compensable as professional services within the meaning of General Order 42, *supra*.

The Bankruptcy Judge found that the services for which these attorneys were compensated were in strict conformity with the standards of General Order 42. The Bankruptcy Judge emphasized that it was he who had placed the onerous burden on these counsel of devoting "their legal talents and consummate skills to overseeing the entire management of the business in order to protect the assets and prevent losses."

In response, the appellants contend that none of the services attributable to Exhibit B, except the initial fashioning of the procedure to request a court order for each expenditure, are professional services. The litigants dispute who actually prepared and submitted these requests for court orders approving expenditures. The appellants contend that it was the managerial personnel of the debtor-in-possession who prepared and submitted the requests. This is not clear from the record before us and must be determined on remand. We reemphasize that the attorneys can be compensated only for professional services and obviously they cannot be paid for documents which could have been prepared by Cle-Ware clerical personnel.

Absent some determination of the role actually played by counsel in getting each Cle-Ware expenditure approved, we think it impossible to set a fee for the type of services represented in Exhibit B. At the same time, it must be acknowledged that the Bankruptcy Judge, who did not appoint a receiver in this case, placed a heavier than usual burden on counsel in requiring counsel to oversee the entire management of the bankrupt. However, we find nothing in the Bankruptcy Act that permits attorneys to be compensated for services ordinarily performed by receivers even if it is alleged to have saved the bankrupt

estate some money. Counsel for the debtor-in-possession are experienced bankruptcy attorneys and must be charged with full knowledge of the strict requirement of General Order 42 that attorneys be compensated only for professional services. Neither the Bankruptcy Court nor this court can abrogate General Order 42.

On remand, in determining a reasonable fee to be allowed these attorneys, each Exhibit A item should be reviewed to determine whether it constituted professional services under General Order 42. Counsel for the debtor-in-possession should be compensated only for those activities which were professional *legal* services.

The appellants' third assignment of error with respect to the compensation award to the attorneys for the debtor-in-possession is that the award represents compensation for duplicated services. In the previous Section V of this opinion, we have determined that two sets of attorneys should not be compensated for overlapping services and that the test which should be employed on remand in determining which set was entitled to compensation for a particular service is as follows: Within the scope of which particular set of attorneys' duties should the service have been rendered?

The appellants' final assignment of error with respect to the compensation award to the attorneys for the debtor-in-possession is that the Bankruptcy Judge abused his discretion in allowing $197,500 in fees. In support of this contention, the appellants assert that the hourly rate of $50 applied to Exhibit A claims was higher than the prevailing rate recommended by the local bar association.

For the reasons hereinbefore stated, on remand the litigants should be permitted to introduce "opinion evi-

dence touching the reasonableness of the fee" prior to the allowance of any fee to these attorneys.

Compensation of the attorneys for the debtor-in-possession should be allowed only for legal services customarily performed by attorneys serving in that capacity. These are limited to legal services to the debtor-in-possession in connection with the operation of the business.[13] Once the petition for a plan of arrangement had been filed, the property was in the custody of the debtor-in-possession. The attorneys for the debtor-in-possession are entitled to be compensated only for those legal services performed by them in connection with the operation of the business.

Accordingly, we reverse the order of the District Court affirming the compensation award to counsel for the debtor-in-possession, and remand for a hearing on the objections raised by the appellants and for determination of a reasonable fee consistent with the principles herein stated.

## VII. Conclusion

In *Gochenour v. Cleveland Terminals Bldg. Co.*, 142 F.2d 991, 995 (6th Cir. 1944), this court emphasized that compensation is allowable only with respect to "matters in connection with the reorganization of the debtor and proceedings on behalf of creditors and stockholders. [The Act] comprehends matters directly affecting the plan of reorganization and excludes those indirectly affecting them. . . . It is the duty of the court in administering the bankruptcy law to avoid double expense to the estate. . . ."

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13. For further discussion of the customary duties of counsel for the debtor-in-possession, see Rudin, "Allowances in Chapter XI Proceedings," 40 *Ref. J.* 29, 30 (1966) and 8 *Collier on Bankruptcy* ¶ 6.32, at 960-983 (14th ed. 1971).

In order to avoid the double expense of attorneys' fees for bankrupt estates in this Circuit, we today announce the general rule that hereafter we will not approve the practice of appointing and compensating separate counsel for the debtor-in-possession and at the same time compensating the debtor's privately-retained counsel for legal services rendered after the filing of a petition for a plan of arrangement. We see no valid reason, except in exceptional circumstances which we do not now foresee, why legal representation in both capacities should not be limited to one attorney or one set of attorneys.

Application of this new rule to the attorneys in this case obviously would be unjust. Therefore, the rule will be applied only prospectively. A determination must be made of the fees which should be allowed to the attorneys in the present case. In Sections V and VI of this opinion, we have set forth guidelines which in summary indicate that these particular attorneys are to be reasonably compensated for the unduplicated, professional legal services which they rendered for their respective corporate clients within the scope of their respective customary duties.

It is reemphasized that the combined fees to be allowed to the attorneys for the debtor and the attorneys for the debtor-in-possession in no event shall exceed the amount of a reasonable fee which would be allowable to one attorney representing Cle-Ware and its subsidiaries in both capacities.

The fee allowed to the respective attorneys will be supported by finding of fact after an evidentiary hearing as hereinabove provided.

Reversed and remanded.

## APPENDIX

The Supreme Court of the United States in an order dated April 24, 1973, prescribed Rules of Bankruptcy Procedure pursuant to 28 U.S.C. § 2075.

The Bankruptcy Rules took effect on October 1, 1973, and were made applicable to proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which event the former procedure applies. The Bankruptcy Court and District Court proceedings in the present case were completed in 1972 and, hence, the former procedure governs disposition of this case.

The new Bankruptcy Rules abrogated most of the General Orders in Bankruptcy, including General Orders 42 and 44 which are especially applicable in the present case.

Bankruptcy Rule 215, which superseded General Order 44, is as follows:

### Rule 215.

### EMPLOYMENT OF ATTORNEYS AND ACCOUNTANTS

(a) *Conditions of Employment of Attorneys and Accountants.* No attorney or accountant for the trustee or receiver shall be employed except upon order of the court. The order shall be made only upon application of the trustee or receiver, stating the specific facts showing the necessity for such employment, the name of the attorney or accountant, the reasons for his selection, the professional services he is to render, and to the best of the applicant's knowledge all of the attorney's or accountant's connec-

tions with the bankrupt, the creditors, or any other party in interest, and their respective attorneys and accountants. If the attorney or accountant represents or holds no interest adverse to the estate in the matters upon which he is to be engaged, and his employment is in the best interest of the estate, the court may authorize his employment. Notwithstanding the foregoing sentence, the court may authorize the employment of an attorney or accountant who has been employed by the bankrupt when such employment is in the best interest of the estate. The employment of any attorney or accountant shall be only for the purposes specified in the order, but the court may authorize a general retainer of an attorney when necessity therefor is shown.

(b) *Employment of Attorney or Accountant with Adverse Interest.* If without disclosure any attorney or accountant employed by the trustee or receiver shall represent or hold, or shall have represented or held, any interest adverse to the estate in any matter upon which he is so employed, the court may deny the allowance of any compensation to such attorney or accountant, or the reimbursement of his expenses, or both, and may also deny any allowance to the trustee or receiver if it shall appear that he failed to make diligent inquiry into the connections of such attorney or accountant.

(c) *Employment by a General Creditor.* An attorney or accountant shall not be disqualified to act as attorney or accountant for the trustee or the receiver merely because of his employment by a general creditor in the case.

(d) *Employment of Attorney or Accountant on Salary.* A trustee or receiver authorized to operate

the business and manage the property of the bankrupt may, without specific authorization under subdivision (a) of this rule, continue or engage any attorney or accountant as a salaried employee if such employment is necessary in the operation of the business and management of the property of the bankrupt.

(e) *Employment of Trustee or Receiver as Attorney or Accountant.* The court may authorize the trustee or receiver to act as an attorney or accountant for the estate if such authorization is in the best interest of the estate.

(f) *Services Rendered by Member or Associate of Firm of Attorneys or Accountants.* If, under this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed on behalf of a professional partnership or corporation, any member or regular associate of the firm may act for the attorney or accountant so employed, without further order of the court, and his services may be compensated as services of the attorney or accountant in accordance with Rule 219.

Bankruptcy Rule 219 was derived from portions of the Bankruptcy Act and several General Orders, including General Order 42. Bankruptcy Rule 219, in relevant part, is as follows:

Rule 219.

COMPENSATION FOR SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES INCURRED IN A BANKRUPTCY CASE

(a) *Application for Compensation or Reimbursement.* A person seeking compensation for services, or

reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered and expenses incurred, (2) the amounts requested. An application for compensation shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person on his behalf.

* * * * *

(c) *Factors in Allowing Compensation.*

* * * * *

(3) *Attorney or Accountant.* Compensation may be allowed an attorney or an accountant only for professional services.

## JUDGMENT OF THE COURT OF APPEALS

(Filed February 26, 1974)

No. 73-1063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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In the Matter of:

CLE-WARE INDUSTRIES, INC., *et al.*, *Debtors*

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CLE-WARE INDUSTRIES, INC., *et al.*,
*Appellants,*

vs.

HOWARD L. SOKOLSKY, JEROME FRIEDLANDER, RICHARD PHILLIPS, FRANK C. WHALEN, KOHRMAN AND JACKSON,
*Appellees.*

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Before: PHILLIPS, Chief Judge, CECIL, Senior Circuit Judge, and ALLEN, District Judge.

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APPEAL from the United States District Court for the Northern District of Ohio.

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JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause and the same is hereby reversed and the case is remanded.

It is further ordered that Appellants recover from Appellees, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by Order of the Court.

/s/ JAMES A. HIGGINS
*Clerk*

## JUDGMENT OF THE DISTRICT COURT AFFIRMING THE JUDGMENT AND FINDING OF THE BANKRUPTCY JUDGE

(Filed November 20, 1972)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

This court has received the briefs submitted by counsel and the lengthy opinion of Bankruptcy Judge O'Neill. His opinion is clearly correct. His opinion is incorporated herein and is affirmed. Each and every specification of error raised by the debtor is rejected.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
*Chief Judge*

## JUDGMENT AND OPINION OF BANKRUPTCY JUDGE

(Dated July 17, 1972)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Proceedings Under Chapter XI
Case No. B 71-829

In the Matter of: CLE-WARE INDUSTRIES, INC., *Debtor.*

### ALLOWANCE OF FEES AND SECOND ORDER OF DISTRIBUTION

This matter came on for hearing before the Court on the separate applications for allowance of fees filed by attorneys for the debtor corporation and the debtor-in-possession for legal services rendered in the administration of this case filed under Chapter XI of the Bankruptcy Act.

After due notice, a hearing was conducted with the applicants, the officers of the debtor corporation and the parties who deposited the necessary funds for this successful arrangement proceedings, the latter being represented by Attorney Mark S. Lieberman of Chicago, Illinois. Since no objections were raised to several other applications considered by the Court, an allowance was made and a first order of distribution entered on March 14, 1972.

To the applications by counsel for the debtor and debtor-in-possession, however, Mr. Lieberman presented

written objections at the hearing. Although the Court had no prior notice of objections, it heard oral arguments by the objector, Mr. Lieberman, and responses of the applicants. Counsel were also permitted to subsequently file briefs, answers and replies in which numerous cases were cited, all of which have been read by this Court.

It is important to note at the outset that the money for these fees is presently on deposit pursuant to Section 361 of the Bankruptcy Act, and the funds are available for immediate disbursement. These requests for allowances were presented to the depositor prior to confirmation of the plan of arrangement on October 13, 1971, to permit his posting the necessary funds to implement the plan, and no objections were raised at that time. Although the interests of creditors are not affected by these allowances nor would Mr. Lieberman's efforts in any way benefit creditors, the Court, nevertheless, at all times maintains diligent surveillance to insure the prevention of "excessive or exorbitant fees". *Collier on Bankruptcy, Volume 8,* page 722 (4). The financial strength of the debtor, however, is also foremost in the Court's mind to be certain the debtor emerges in a healthy condition.

It further warrants mentioning that this Court prefers the appointment of a receiver in cases of this nature, but the cost herein would have been so extremely inordinate that none was appointed. For this reason and the expert knowledge required to operate this vast complex in a highly specialized field, the debtor was permitted to remain in possession under the direct supervision of the Court.

Before reciting the salient features of this protracted Chapter XI proceeding, it may be helpful to set forth the applications in issue and the bases for Mr. Lieberman's objections.

I. ATTORNEYS FOR THE DEBTOR, ALAN E. BERMAN; ROBERT H. JACKSON; WELLS, MARKS & WHALEN.

REQUESTS FOR COMPENSATION: $180,000.00

Mr. Lieberman objects to this request by counsel for the debtor for the following reasons:

1. Counsel "were not retained pursuant to an order of Court as required by General Order 44".
2. "Many of the services for which compensation is required are not compensable".
3. "Services rendered prior to the filing of the voluntary petition in Chapter XI are non-compensable".
4. "Numerous services for which compensation is requested were ministerial and administrative in nature for which legal training was not required".
5. "The amount of compensation is excessive and contrary to the economical spirit of the Bankruptcy Act".
6. "Contingency is illegal and improper in evaluating the amount of compensation".

II. ATTORNEYS FOR DEBTOR-IN-POSSESSION, JEROME M. FRIEDLANDER. RICHARD L. PHILLIPS; HOWARD L. SOKOLSKY.

REQUESTS FOR COMPENSATION: $200,000.00

The following objections to this request were also lodged by Mr. Lieberman:

1. "The services for which compensation is requested duplicate services rendered by the executive and

managerial personnel . . . and, consequently, were not beneficial to the estate".

2. "Such services do not to a significant degree rise to the level of professional legal services".
3. Services attributable to Exhibit "B" are "clearly administrative and ministerial in natural and, therefore, are not entitled to be compensated at a rate which would otherwise be appropriate had they involved high professional skill".
4. Services are "non-compensable because of the absence of detailed time records and because the compensation requested is excessive".
5. Services in Exhibit "A" "duplicate those rendered by the attorneys for debtor insofar as they relate to the preparation, negotiation and consummation of the sale of stock provided for in the plan".

## III. GENERAL BACKGROUND

This matter was commenced on February 18, 1971 by the filing of a voluntary petition under Chapter XI of the Bankruptcy Act by the parent, Cle-Ware Industries, Inc. This local corporation was encountering grave financial difficulties and sought rehabilitation with the assistance of the Court. Approximately one week later on February 24, 1971, similar petitions were filed by nine subsidiary corporations. For purposes of a more efficient administration, the ten corporations were consolidated, but the legal services rendered were performed for all ten debilitated entities.

Cle-Ware Industries, Inc. and subsidiaries were involved in the nationwide distribution and warehousing of automotive parts, accessories, hardware and plumbing

supplies. Facilities were being operated in Cleveland, New York, Atlanta, Puerto Rico and California while the Rayco division had 159 outlets throughout the entire United States together with a manufacturing plant in Pawtucket, Rhode Island. The enormous operation of this complex giant required the employment of hundreds of people throughout the country and produced an annual sales volume of approximately $44 million.

The exhausting and invaluable, legal services rendered by counsel in this highly successful arrangement proceedings are set forth with detailed perspicacity in their respective applications. Since considerable attention will be devoted to each application separately, suffice it to say at this juncture that the incomparable skill and expertise of these learned scholars and able practitioners was the primary factor in resuscitating Cle-Ware and subsidiaries. The hundreds of jobs saved, the payment of hundreds of thousands of dollars in wages and taxes, payment in excess of $4 million in secured debts and partial payment to the unsecured creditors whose claims approximate $20 million, is just the tip of the iceberg of the incredible accomplishments of these dedicated attorneys. In pounding out the survival of what is presently a viable enterprise, counsels' indefatigable efforts also benefited the stockholders most handsomely. It is, indeed, a tribute to the specialized talents of these highly skilled lawyers that a successful arrangement was ultimately effected. In brief, a masterful job very well done!!

## IV. APPLICABLE LAW IN GENERAL

There is a plethora of material on the principles applicable to compensation of attorneys in bankruptcy matters. In *Collier on Bankruptcy*, Volume 3 A, 14th Edition, Section 62.12, page 1489, we find

"The allowance of fees to an officer's attorney depends largely upon the facts of the individual case. In view of the fact that the elements determining an allowance are multifarious and vary with each case, *decisions as to the amount of allowance as such have little, if any, value as precedents.* . . . As any other category of administrative expenses, fees for an officer's attorney are governed by 'the economical spirit of the Bankruptcy Act.' However, *'economical' is by no means synonymous with 'parsimonious'* and should not exclude a compensation that is under all the circumstances of the case fair and reasonable. To reserve as much as possible for distribution to the creditors is one postulate, but there is another, perfectly compatible with the former, *not to discourage needlessly able and competent lawyers from accepting a retainer in bankruptcy by denying them reasonable remuneration.* A misunderstood economy in this respect may lead to evils far greater than the sacrifice imposed on the individual creditor by reason of an equitable allowance for meritorious and diligent counsel. . . .

"In determining the reasonable value of services rendered by an attorney the following elements are to be considered: 'the time spent, the intricacy of the problems involved, the size of the estate, the opposition met, the results achieved,—all subject to the economical spirit of the Bankruptcy Act'. In view of the primary purpose of bankruptcy liquidation it is not surprising to find that, aside from the principle of economy, *the results achieved constitute the factor of greatest determinative weight.*

*'Success is the test applied by the business world in measuring compensation. It is largely so in the courts.* As a rule, professional services, however able

or prolonged, which yield no results, command no high reward.' This implies that (1) great success and benefit to the estate commands a liberal compensation, and (2) all effort and labor may go virtually without reward where no benefit accrued to the estate. *Benefit to the estate as a yardstick for measuring the value of attorneys' services has been recognized by the Supreme Court. . . .*" (cases cited) (emphasis mine)

Among others, the leading cases on the subject of attorneys fees are the oft-quoted *Matter of Owl Drug Co.*, 16 F.S. 139 (D.C. Nev. 1936), and *Jacobowitz v. Double Seven Corporation*, 378 F.2 405 (C.C.A. 9, 1967), both of which will be referred to throughout this order. From the Owl Drug case, we developed our local Bankruptcy Rule of Court 12c which has most satisfactorily guided this Court over the years and warrants setting forth in toto:

"(c) Among the factors to be taken into consideration in determining the compensation to be allowed to attorneys entitled thereto by law are the following:

1. The amount of work done.
2. The difficulties or intricacies of the problem presented.
3. The skill required and experience of counsel in similar cases.
4. The results accomplished.
5. The amount involved in connection with the services rendered.
6. The size of the estate.
7. The length of time consumed.
8. Contingency or certainty of compensation."

The introduction of the *1972 Professional Fee Guide of the Cuyahoga County Bar Association*, which is of considerable value to the practitioners and the Courts, enumerates the factors to be considered in determining fees. These elements are taken from Disciplinary Rule 2-106 of the Code of Professional Responsibility published by the American Bar Association as follows:

> "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent."

In the *April, 1962, Volume 36, Journal of the National Association of Referees in Bankruptcy on page 56*, the learned and highly respected Honorable Asa S. Herzog of New York writes in part on allowances:

> ". . . lacking a formula, we must fall back on 'reasonableness', that is, somewhere in the area where the

fees are neither so high as to startle the judgment nor so low as to be unmindful of the dignity of the profession and forgetful of the important duty of counsel.

'But if economy is one side of the coin, then fairness is surely the other side, for the workman is worthy of his meat and skilled attorneys are entitled to the fair value of their services. While the court must keep one eye on economy, it cannot close the other to economics. *With the cost of living index spiralling up, fees generally must be revised upwards* . . . The referees and the judges, many of them out of private practice for years, should judicially notice the economic trends, *particularly in their own geographical location*. . . .

'If compensation is not geared to modern conditions competent and diligent attorneys will not be available in bankruptcy cases. Should attorneys of high standing and caliber turn away from bankruptcy as unprofitable and the practice fall into the hands of the less reputable and less competent, the creditors will foot the bill for improper, incomplete, and, perhaps, a tarnished administration. Such a result is to be avoided at all costs, and only a realistic appraisal of the value of legal services can prevent it. . .

'Complicated problems and serious opposition must be reflected in the size of the fee. For exacting labor done, weighty responsibilities assumed and great results accomplished, compensation should be dealt out with a more liberal hand than in a routine case involving no litigation and no intricate problems. . . .

'One of the more baffling elements considered by the courts is the amount of time consumed in rendering the services for which compensation is

sought. *It seems unfortunate that of recent years this factor in terms of number of hours consumed has received unwarranted emphasis. Is an attorney to be penalized because his mental agility enables him to accomplish the same results in half the time it takes his competent, but slower colleague?* If number of hours employed is to have weight, then the court must first determine whether it was necessary to spend the amount of time claimed by the applicant. The test should be time "fairly and properly" necessary to deal with the case, rather than actual time logged. . .

*"The quality of the skill which the situation facing the attorney demanded and the skill employed in meeting the situation are indeed features which deserve prominence in the consideration of a reasonable fee.* And it is precisely this skill which makes 'time consumed' such an unreliable factor unless both are considered together as a single component. *The sine qua non of the allowance is the benefit the bankrupt's estate and its creditors have derived from the services rendered."* (emphasis mine)

## V. APPLICATION FOR ALLOWANCES, ATTORNEYS FOR DEBTOR

To corroborate their request, counsel for the debtor have filed a pellucid application consisting of ten pages of general statement, a summary sheet reflecting 2517 hours of legal services rendered from January, 1971 through November, 1971 and 60 pages explaining in detail the breakdown of the services.

For purposes of this order, it is utterly impossible to relate succinctly the onerous and yet most productive legal work performed in this case. Although the entire span of nine months is ephemeral compared to many protracted matters requiring years of administration, the com-

plexity of Cle-Ware demanded full-time employment by these attorneys and their legal staffs. There were literally thousands of pleadings, preparation and filing of difficult schedules, reviews of thousands of applications, orders and reports, constant and lengthy negotiations with the banks, other secured creditors, Creditors' Committee, probable investors and employees. In addition, there were innumerable meetings and hearings in Court, the drafting of the complicated Plan and its amendments, S.E.C. conferences and many other legal duties too numerous to mention or detail herein. Most important, however, the Plan of Arrangement continued the debtor as a viable entity which continues to supply its countless customers, the employees have been retained and the general creditors will receive 5¢ on the dollar with a stock option or the possibility of 15¢ to 20¢ on the dollar for those who elected to take deferred payments. Alternatively, an adjudication and liquidation would have been a total disaster.

Objections to this request for fees were made by Attorney Lieberman, who, incidentally, had nothing whatsoever to do with this proceeding until the hearing on applications for fees. In summary, his objections basically are that (1) counsel for the debtor were not properly retained by order of Court pursuant to General Order 44, (2) many services were non-compensable in that they were non-legal and rendered prior to the filing of the Chapter XI petition, and (3) compensation requested is illegally based on a contingency and is excessive.

1. *The Objection on Non-Compliance with General Order 44.*

Mr. Lieberman relies heavily upon his contention that counsel for the debtor were not appointed pursuant to General Order 44 which states, inter alia, that "no attorney

for a receiver, trustee or debtor-in-possession shall be appointed except upon the order of the Court. . ."

Since General Order 44 makes no mention of the attorney for the debtor, Mr. Lieberman valiantly attempts to torture its applicability to the case at bar primarily through the use of two cases; namely, *In re Hydrocarbon Chemicals, Inc.* 411 F.2 203 (C.C.A. 3), (1969) and the 6th Circuit case of *Gochenour v. Cleveland Terminal Building Co.* reported in 142 F.2 991 in 1944. Neither of these cases, however, is illustrative.

The *Hydrocarbon* case, *supra*, was originally a Chapter XI proceeding and subsequently converted to Chapter X. While in Chapter XI the Court appointed a receiver who retained two sets of attorneys upon order of the Court. Thereafter, the claimants, attorneys, who were retained by the debtor's attorney without Court approval settled claims of creditors and removed the Government's jeopardy tax assessment. The Court rightfully held such services to be "clearly among the duties of the receiver which should have been performed by him and his atttorneys".

In the *Gochenour* matter, *supra*, the claimants, attorneys, had matters pending in State Court when the Section 77 B arrangement proceeding was filed. They sought authority to prosecute certain actions and were refused. Claimants then proceeded without the Bankruptcy Court's authority to collect a chose in action and, in reality, conferred no benefit to the estate. These attorneys were rightfully held to be volunteers and entitled to no compensation.

Both cases of *Hydrocarbon* and *Gochenour, supra,* are readily distinguishable from the case at bar where counsel were retained to represent the debtor as evidenced by their having filed the petition on February 18, 1971. By

the specific language of General Order 44, it is obvious the debtor has a right to select his attorneys without Court approval or appointment.

2. *Objection to Services as Being Non-Legal and Performed Prior to Filing of Proceedings.*

(a) The fact that attorneys are compensated for services of a legal nature only is uncontroverted. Mr. Lieberman maintains, however, the services performed by counsel were ministerial and not of a legal or professional nature.

This extremely complicated and tedious corporate reorganization was filed on February 18, 1971 and confirmed on October 13, 1971 after arduous and exhaustive efforts by all counsel. Since Mr. Lieberman's first appearance was January 24, 1972, at the hearing on fees, three and one-half months after confirmation, he understandably is unaware of the demands made upon counsel by this Court, demands that at times were admittedly unreasonable. Because of the important and wide-spread operations of CleWare with many critical eyes focused thereon, this Court established stringent guidelines for the attorneys. The inordinate burden was placed upon the debtor and counsel to submit daily operating statements reflecting all receipts and disbursements, again an unconscionable requirement.

Meetings were called and conducted by the Court on a moments notice to review the cash-flow position in order to justify this unwieldy operation. Innumerable progress meetings of this nature were held in the early mornings, evenings after the work day and even on Saturdays and Sundays with complete and total cooperation of counsel. In determining all services rendered by counsel to be legal and professional, reference is made to the language found in the above cited *Hydrocarbon* case. In his dissent, then Chief Justice Hastie of the Third Circuit

Court of Appeals, in commenting on the majority's treatment of the claimant's request for compensation as "intermeddling volunteers", states on page 209, "I disagree with this reasoning because I think it does not sufficiently take into account significant differences between an ordinary bankruptcy administered by a Court appointed trustee and a debtor proposed Chapter XI arrangement. . . ." Several excellent paragraphs follow in which Judge Hastie articulately differentiates between an ordinary bankruptcy and a Chapter XI proceeding and the responsibility placed upon the debtor and counsel in Chapter XI to bring about their "efforts to arrange his affairs that he will salvage some significant part of his estate while making acceptable provisions for his creditors. . . . Much of a debtor's activity in shaping and reshaping a plan and in removing impediments to its acceptance by creditors is lawyer's work properly intrusted to the debtor's attorney." All services performed and enumerated by counsel herein are legal and professional.

(b) To support his contention that services rendered prior to the filing of the petition are non-compensable, Mr. Lieberman again relies heavily upon the *Owl Drug* case, *supra*. This Court agrees with the holding in *Owl Drug* which, however, was an involuntary case filed by creditors and the services of the bankrupt's attorney actually commenced upon his being retained after the bankrupt was served a copy of the petition. The Owl case is certainly not analogous to the case at bar, however, there is merit to the Lieberman objection that services rendered prior to the Chapter XI proceeding are not wholly compensable as costs of administration. Consequently, this Court is constrained to find that the services performed by the firm of Kohrman and Jackson in January and a portion of February, 1971, are not a proper cost of administration as will be reflected in the ultimate allowance.

3. *Objection That Compensation is Illegally Based Upon Contingency and is Excessive.*

The allegation by Mr. Lieberman that counsel for the debtor have based their fees upon a contingency is, in the opinion of this Court, a spurious charge without foundation and warrants no further comment.

In his asseveration that requests for fees are excessive, Mr. Lieberman cites the case of *In re Mabson Lumber Co.*, 394 F.2 23, (C.C.A. 2), (4/26/68). Although Mabson involves liquidation in a straight bankruptcy rather than a Chapter XI proceeding, it is interesting to note the Court's thinking on page 25, ". . . that fees allowed be such as not to discourage competent counsel from active and effective participation." Mr. Lieberman further relies upon the *Matter of Roustabout Company,* 386 F.2 354, (C.C.A. 3), (9/27/67), also a straight bankruptcy liquidation and inapplicable to the case at bar.

As previously stated Mr. Lieberman, the objector, entered no appearance in this case until the hearing on applications for allowances on January 24, 1972. Even the reviewing Courts have repeatedly held that because of the trial Court's personal knowledge of the nature and magnitude of services rendered considerable latitude be given to his allowances.

In the *Gochenour* case, *supra,* on page 995 the Court states, "The trial judge is familiar with proceedings in his Court and also has expert knowledge as to the value of the legal services. He should, therefore, have a broad discretion on the subject since he has a far better means of measuring what is just and reasonable than an appellate Court."

In *Stein v. Hemker,* 157 F. 740 (C.C.A. 8), (10/24/46), we find on page 743 that "on review the Appellate

Court must give due regard to the trial Court's superior knowledge concerning the details of the reorganization proceeding and the contribution of counsel in the conservation of the debtor's estate. . ."

From a thorough analysis of the assiduous efforts of counsel for the debtor, the Court finds and concludes that (1) General Order 44 is inapplicable and counsel were properly retained, (2) the services performed were legal and professional and not contingent, (3) requests for compensation are excessive only in that a portion of the services rendered by Kohtman and Jackson prior to the filing of the petition is not a proper cost of administration and, therefore, an allowance of $162,500.00 is fair and reasonable and counsel for the debtor are awarded same.

## VI. APPLICATION FOR ALLOWANCES, ATTORNEYS FOR DEBTOR-IN-POSSESSION

Mr. Lieberman's six objections to applications for allowances by counsel for the debtor-in-possession can best be summarized as claiming the services to be (1) ministerial rather than professional in nature, (2) duplicative of services by attorneys for debtor and the managerial personnel and, hence, not of a legal nature and (3) improperly recorded and excessive.

1. *The Objection That Services are Non-Professional, Duplicative and Improperly Itemized Without Time Records.*

This fee bill submitted by counsel consists of a twelve page summary and Exhibits "A" and "B". Exhibit "A" is a thorough 202 page, detailed breakdown of services rendered from February 13, 1971 through November 29, 1971, Exhibit "B" is an additional 79 page itemization of expenditures by Cle-Ware and the legal services per-

formed by counsel on these disbursements from February 25, 1971 through October 22, 1971. It is the services set forth in Exhibit "B" consisting of 8,847 entries aggregating disbursements of $10,762,176.40 to which Mr. Lieberman most vociferously objects as being non-professional, not having proper time records and a duplication of ministerial services of executive and managerial personnel.

As previously noted, when this matter was filed on February 18, 1971, the Court held numerous sessions with the debtor and counsel to establish rigid boundaries in which the debtor-in-possession was to operate the Cle-Ware empire. The Court was fully cognizant and most sensitive to the fact that since the debtor manifested his inability to successfully operate the business prior to filing, the creditors had little faith or confidence in his running the business subsequent to filing. Consequently, an additional onerous burden was placed upon counsel to devote their legal talents and consummate skills to overseeing the entire management of the business in order to protect the assets and prevent losses. To insure this end, the Court required every expenditure to be made only upon application and order of the Court. According to the fee bill, there were 2,487 applications and accompanying orders prepared, reviewed, studied and approved by counsel before being ultimately filed for Court approval. All of these legal duties were most competently performed pursuant to the application and order employing counsel which the Court signed on February 18, 1971. To require specific time records for each entry is unreasonable and extraordinarily costly.

Services rendered by counsel for the debtor-in-possession were performed ably and efficiently with the highest of legal standards and in no way were duplicative of work performed by managerial personnel or services of

other counsel. The economical aspects of administration were also observed as evidenced by the fact that if counsel had charged even $15.00 for each application and order covering the 8,847 separate disbursements, a total of 17,694 pleadings, the cost would have been staggering and far in excess of the amount requested herein.

There is no question that the services rendered were in compliance with the rules prescribed by the Court, and in awarding fees, the Court is in strict conformity with General Order 42 which states, "No allowances of compensation shall be made to any attorney for a receiver, trustee or debtor-in-possession except for professional services."

Again, the cases cited by Mr. Lieberman are *Mabson* and *Roustabout, supra,* both of which, as previously noted, involve fees for attorneys in straight bankruptcy cases and are of little assistance in the Chapter XI case at bar.

2. *Objections of Excess Costs of Administration and Requests for Compensation.*

Mr. Lieberman is also highly critical of this Court's permitting attorneys for the debtor-in-possession when the debtor has already retained counsel. This precautionary and widely accepted practice has proved to be most satisfactory in this and many other Courts. This Court has always regarded the debtor and debtor-in-possession as separate entities for reasons explained in *Collier,* Volume 8, Sections 6.25 and 6.30 on pages 938 and 949 respectively, "Careful distinction must be drawn between a debtor and debtor-in-possession. Regardless of whether or not there is a receiver or trustee, *a debtor as such possesses certain rights and privileges and is subject to certain duties.* If the debtor continues in possession of his property pursuant

to Section 342 (of the Bankruptcy Act), then *as debtor-in-possession he has separate and additional status with incidents of its own.*" (emphasis mine)

Since, in the opinion of this Court, there is always a possibility, however remote, of conflict of interest between the separate entities of debtor and debtor-in-possession, this Court has always appointed, upon proper application, separate counsel from that of the debtor. The possibility of conflict is thereby removed to the satisfaction and peace of mind of both entities, the creditors, the public and the Court. The economical spirit of the Bankruptcy Act is also preserved because when one attorney wears two hats by serving two masters, in addition to the possibility of conflict, his fees are based upon the performance of two separate functions.

Another objection by Mr. Lieberman is that too many lawyers were permitted in this case and, hence, larger fees. It is, therefore, important to emphasize that only two attorney fees are awarded in this order, one for debtor's counsel and the other to counsel for the debtor-in-possession. So long as the provisions of Section 62d of the Bankruptcy Act regarding the attorneys' applications for compensation and the accompanying affidavits are satisfied, which they are, the Court is not to concern itself with the number of partners or members in the law firms.

Mr. Lieberman further charges that counsels' request for compensation is excessive. In addition to my prior comments on the intricacies and quality of services performed, this case is notable in that the legal problems ran the gamut of the law including the nuances of bankruptcy, labor, taxes, real estate, insurance, Uniform Commercial Code, etc. A myriad of legal difficulties, which often appeared insurmountable, were encountered with

banks, unions, would be investors, secured and unsecured creditors, etc., and were ultimately untangled and solved. Only the unique knowledge and able, legal handling of counsel prevented protracted and costly lawsuits. Unquestionably, these excellent lawyers were directly responsible for the rapid and successful disposition of this laborious proceeding.

Regarding the claim of excessive fees and the subject of economy of administration, it warrants repeating that in the case at bar, the prohibitive cost of a receiver was eliminated and no accountants were employed. Although counsel have reduced their requests from $227,699.00 to the present figure of $200,000.00, the Court, however, is of the opinion that a number of the pleadings were boiler-plate in form, a fact which will be taken into consideration in the allowance.

After a sedulous perusal of the fee bill presented by counsel for the debtor-in-possession, the Court finds and concludes that the services rendered were, (1) professional and legal and neither duplicative nor ministerial, (2) properly recorded in the least expensive manner, (3) most beneficial to the estate and excessive only in that some of the pleadings were boiler-plate in form and, therefore, an allowance of $197,500.00 is fair and reasonable and is awarded to counsel for the debtor-in-possession accordingly.

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"There is nothing more difficult nor embarrassing than to appraise the value of professional services," *In the Matter of Dole Company,* 244 F.S. 751, (D.C. of Me.), page 757.

In undertaking this task of allowances, therefore, it bears repeating that the guidelines of the Bar Associations, the texts and cases were given considerable thought and

followed as closely as possible. As stated, however, on page 405 of the *Jacobowitz* case, *supra*, "determination of attorney fees to be allowed in bankruptcy proceedings must be considered and determined on a case by case basis." Consequently, the amount of work performed herein, legal intricacies of the problems encountered, ability and skill required, experience and reputation of counsel, results obtained, etc., are extremely important. The length of time devoted is persuasive, but this Court is not as impressed with the time-clock approach as it is with the other elements, particularly the results accomplished. Counsels' being precluded from other employment and fees customarily charged in this locality for similar legal services are also of great concern. Economy is essential, but the admonition on page 408 of *Jacobowitz, supra*, is vital, "The economical spirit of the Bankruptcy Act is one of the considerations going into the determination of reasonable fees in bankruptcy cases, but is only one consideration to be weighed and valued along with others."

In summary, attorneys for the debtor requested $180,000.00 and are allowed $162,500.00; attorneys for debtor-in-possession requested $200,000.00 and are awarded $197,500.00, to be disbursed accordingly.

IT IS SO ORDERED.

Dated this 17th day of July, 1972.

/s/ WILLIAM J. O'NEILL
*Bankruptcy Judge*

## PROPOSED BANKRUPTCY RULES

RULE 11-31. COMPENSATION FOR SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES INCURRED IN A CHAPTER XI OR SUPERSEDED CASE.

Bankruptcy Rule 219 applies in Chapter XI cases.

RULE 11-32. EXAMINATION OF DEBTOR'S TRANSACTIONS WITH HIS ATTORNEY

Bankruptcy Rule 220 applies in Chapter XI cases.

## PRESENT BANKRUPTCY RULES

### Rule 220.

### Examination of Bankrupt's Transactions with His Attorney

(a) *Payment or Transfer to Attorney in Contemplation of Bankruptcy.* On motion by any party in interest or on the court's own initiative, the court may examine any payment of money or any transfer of property by the bankrupt, made directly or indirectly and in contemplation of the filing of a petition by or against him, to an attorney for services rendered or to be rendered.

(b) *Payment or Transfer to Attorney, or Agreement Therefor, After Bankruptcy.* On motion by the bankrupt or on the court's own initiative, the court may examine any payment of money or any transfer of property, or any agreement therefor, by the bankrupt to an attorney

after bankruptcy, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the bankruptcy.

(c) *Invalidation of Unreasonable Payment, Transfer, or Obligation.* Any payment, transfer, or obligation examined under subdivision (a) or (b) of this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The amount of any excess found to have been paid or transferred under subdivision (a) or (b) may be recovered for the benefit of the estate or the bankrupt, as their interests may appear, and any obligation found to be excessive may be cancelled to the extent of the excess.

**Rule 219.**

**Compensation for Services Rendered and Reimbursement of Expenses Incurred in a Bankruptcy Case**

(a) *Application for Compensation or Reimbursement. A person seeking compensation for services, or* reimbursement of necessary expenses, *from estate shall file with the court an application* setting forth a detailed statement of (1) the services rendered and expenses incurred, (2) the amounts requested. An application for compensation shall include a statement by the applicant as to what payments *have theretofore been made or promised* to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the partic-

ulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person on his behalf.

(b) *Disclosure of Compensation Paid or Promised to Attorney for Bankrupt.* Every attorney for a bankrupt, whether or not he applies for compensation, shall file with the court on or before the first date set for the first meeting of creditors, or at such other time as the court may direct, a statement setting forth the compensation paid or promised him for the services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of his compensation with a member or regular associate of his law firm shall not be required.

(c) *Factors in Allowing Compensation.*

(1) *General.* The compensation allowable by the court to a trustee, receiver, marshal, attorney, accountant, or other person entitled to compensation for services rendered in the administration of a bankrupt estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of creditors.

(2) *Trustee, receiver, or Marshal.* The compensation allowed by the Act to a trustee, receiver, or marshal shall be in full compensation for the services performed by him as required by the Act and by these rules, but shall not be deemed to cover expenses necessarily incurred in the performance of his duties and allowed upon the settlement of his accounts. Additional compensation may be allowed for legal or other services not required of him by the Act or by these rules, but only if such services were authorized by order of the court before they were rendered.

(3) *Attorney or Accountant.* Compensation may be allowed an attorney or an accountant only for professional services.

(d) *Restriction on Sharing of Compensation.* Except as herein provided, a person rendering services in a bankruptcy case or in connection with such a case shall not in any any form or guise share or agree to share the compensation paid or allowed him from the estate for such services with any other person, nor shall he share or agree to share in the compensation of any other person rendering services in a case under the Act or in connection with such a case. This rule does not prohibit an attorney or accountant from sharing his compensation as trustee, receiver, attorney, or accountant with a member or regular associate of his firm, or from sharing in the compensation received by his firm or by any other member or regular associate thereof, and does not prohibit an attorney for a bankrupt or for a petitioning creditor from sharing his compensation for services rendered with any other attorney contributing thereto. If a person violates this subdivision, the court may deny him compensation, may hold invalid any transaction subject to examination under Rule 220 to which he is a party, or may enter such order as may be appropriate. (Emphasis supplied)